

STATE OF VERMONT
PUBLIC SERVICE BOARD

Amended Joint Petition of Central Vermont)	
Public Service Corporation, Danaus Vermont)	
Corp., Gaz Métro Limited Partnership, Gaz)	
Métro inc., Northern New England Energy)	
Corporation for itself and as agent for Gaz Métro)	
Limited Partnership’s parents, Green Mountain)	
Power Corporation and Vermont Low Income)	
Trust for Electricity, Inc. for approval of: (1) the)	
merger of Danaus into and with Central)	Docket No. 7770
Vermont, (2) the acquisition by Northern New)	
England of the common stock of Central)	
Vermont, (3) the amendment to Central)	
Vermont’s Articles of Association, (4) the)	
merger of Central Vermont into and with Green)	
Mountain, and (5) the acquisition by VLITE of a)	
controlling interest in Vermont Electric Power)	
Company, Inc.)	

REPLY BRIEF OF THE DEPARTMENT OF PUBLIC SERVICE

The Vermont Department of Public Service (“Department”) replies principally herein to the AARP’s Proposed Findings and Conclusions of Law (“AARP Br.”).¹ AARP continues to decry the very same settlement structure the Board found appropriate and that AARP explicitly agreed to in approving the Gaz Metro/GMP acquisition in Docket 7213, and continues its efforts to cut off the benefits of the windfall mechanism from low-income ratepayers – the same group of ratepayers that AARP previously had championed. In addition, AARP’s Brief contains factual errors and misconstrues existing law. Many of the deficiencies have already been addressed in the initial briefs of the Department and the Petitioners and the Petitioners’ Reply Brief; therefore, this reply serves to supplement those briefs and provide further support for the proposed MOU.

¹ The Department also replies briefly to one point raised by VPPSA, to the extent necessary given the agreement reached by the VELCO shareholders regarding the VLITE proposal.

I. THE SAVINGS SHARING AGREEMENT SHOULD BE APPROVED

The Department agrees with AARP that the Petitioners' original proposal – to consider CVPS's windfall sharing obligation satisfied by ratepayer savings attributable to the merger – was insufficient and did not comply with the terms of the relevant PSB orders. *See, e.g.*, Wilson pf. at 36-37. However, that proposal has clearly been superseded by the Petitioners' rebuttal testimony of February 15, 2012 (Griffin reb. pf. at 10 *et seq.*) and further by the Memorandum of Understanding entered into by Petitioners and the DPS (Exhibit Petitioners-DPS-1, "DPS MOU").

AARP nonetheless devotes considerable space in its brief to attacking the superseded proposal, in part by attacking the proposition that an acquiring company might legitimately be allowed to retain a portion of the achieved operational savings attributable to a utility consolidation. AARP Brief at 5-13. AARP supports its arguments with highly selective citations to the testimony of witnesses who do not agree with AARP's overall conclusions² and with its position in Docket 7213, and with a flawed reading of the Board's prior orders. The Board should reject AARP's arguments and approve the DPS MOU and the proposed transactions.

AARP asserts that PSB precedent prohibits the retention by an acquiring company of any savings achieved by utility consolidation. AARP Brief at 23. AARP's analysis conflates acquisition premium recovery (as proposed in the Readsboro acquisition) with the shared savings proposal here, which only permits recovery by the utility in the event such savings are in fact achieved. Moreover, the Department's reading of the relevant PSB Orders leads to a different conclusion than AARP's, namely that the PSB considers the facts of each case in light of both traditional ratemaking standards and the potential benefits to ratepayers of encouraging cost-effective consolidation. *See, e.g.*, Docket 7660, Order entered June 10, 2011 ("*Omya* Order") at 69 (principles appropriate for application to future cases will be decided based on facts presented); Docket 7688, Order entered July 8, 2011 ("*Readsboro* Order") at 13 (case decided on its particular facts and circumstances); Wilson pf. at 32-33.

² The DPS does agree with the implication in AARP's brief that portions of Mr. Hevert's testimony are not reliable. AARP Brief at 6, proposed findings 19-20. In addition to his unwillingness to answer questions on cross-examination, Mr. Hevert's prefiled analysis of double leverage financing was based on the erroneous premise that a rate adjustment or cost of equity determination was at issue in this proceeding.

The *Readsboro* Order notes the lack of precedents “in which the Board expressly authorized a Vermont utility to recover in rates a premium over book value paid to another Vermont Utility as part of the purchase price for assets used in the business.” *Readsboro* Order at 10 (emphasis added, footnote omitted). As shown in the Petitioners’ Initial Brief, the lack of such an express statement has not meant that acquiring companies have never been allowed by the PSB to share in savings produced by mergers. *See* Pet’r’s Brief at 11-13 and cases cited.

AARP fails to acknowledge the impact of the *Readsboro* decision’s reasoning on this docket. In *Readsboro*, the Board expressly noted its support for cost-effective utility consolidations, and declined the opportunity to enunciate an “absolute prohibition” on recovery of acquisitions premiums. Rather, it expressly grounded its refusal to allow such recovery “on the specific circumstances of this proceeding.” *Readsboro* Order at 13. The specific circumstance identified as defeating recovery above Net Book Value was the lack of any credible evidence that the Readsboro acquisition would result in economic benefits for the vast majority of customers who would be paying the premium. *Id.* at 12 (lack of any credible analysis supporting asserted benefits) and 10, n. 16.

The acquisition and merger proposed in this docket stand in stark contrast to the Readsboro acquisition. Here, very significant savings for all ratepayers of the Combined Company are not simply asserted or estimated, they are guaranteed; moreover, the recovery to the acquiring company may only occur *if* savings are indeed achieved. DPS MOU at ¶¶ 15-17. The transaction proposed here underscores the Board’s wisdom in declining to expressly rule that recovery of an acquisition premium by an acquiring company was prohibited. *See Readsboro* Order at 13. While the Public Service Board’s typical adherence to traditional ratemaking standards serves the public interest well, the Board has also shown its willingness to vary from those traditional standards when appropriate to obtain important public benefits, or to adapt to changing circumstances. *See, e.g.*, Docket No. 5270 Order entered April 16, 1990, at Vol. IV, 21, *and* Docket 7660, Order entered June 10, 2011 at 55 *et seq.* This acquisition and merger provide such important benefits.

Another material difference between this case and *Readsboro* concerns the risk of recovery of the acquisition premium and other costs not typically included in rates. In *Readsboro* CVPS sought issuance of an accounting order that would allow it to recover its full purchase price (including premium) in rates, though it would forgo a return on that sum. *Readsboro* Order

at 5 (finding 14) and 14 (¶ 2). Here, it is the Combined Company that bears the risk that the savings it anticipates will not be achieved. Tr. 4/4/12 at 144:3-5 (Miller). The savings guarantees contained in the DPS MOU – over ten years as well as in each of the first three years – mean that the Company will pay ratepayers specified amounts out of its shareholder’s pocket in the event that unforeseen circumstances prevent realization of the expected savings. This allocation of risk is a valuable addition to the significant savings expected to result from the proposed merger.

The proposed sharing of merger savings between ratepayers and shareholder is appropriate, properly allocates the risk of savings not being achieved, does not run afoul of any prior orders of this Board, and should be approved by the Board.

II. AARP’S ARGUMENTS ARE INCONSISTENT WITH THE BOARD’S RULING IN DOCKET 7213

Throughout its brief, AARP urges a narrow interpretation of the original “windfall sharing” decision in Docket Nos. 6460, 6120, *In re Central Vermont Public Service Co.*, 211 PUR 4th 53, 2001 WL 1002730 (June 26, 2001). Much as it crafted its expert testimony to avoid the elephant in the room – the Board’s own interpretation of those Orders in Docket 7213, which is clearly at odds with AARP’s - its brief is drafted so as to minimize those aspects of the Docket 7213 Order which clearly demonstrate that the proposed CEED Fund is entirely consistent with the Board’s interpretation of the original Orders.

AARP claims that the central focus of the original orders was on preventing “unjust enrichment” of CVPS shareholders, reading the use of this term as imposing a requirement that any repayment must come from directly from shareholders and precluding recovery in rates. As discussed in the Initial Brief of the Petitioners, this ignores the Board’s decisions in Docket 7213 denying summary judgment, denying credit or refund to customers, and approving the Efficiency Fund. Pet. Br. dated 4/23/12 at 5-9.

Indeed, the issue of recovery in rates for the windfall mechanism ought to meet the test for issue preclusion as to AARP. *See Sheehan v. Dep't of Employment & Training*, 169 Vt. 304, 308 (1999) (collateral estoppel “bars the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action”)(quotation omitted). The fact that the Board’s Order in Docket 7213 applies to GMP and not CVPS is of no moment. *See Trepanier v. Getting Organized, Inc.* 155 Vt. 259, 266 (1990) (“[t]he absence of mutuality will not preclude the use of collateral estoppel unless the party denying the estoppel shows special circumstances indicating unfairness”). In Docket 7213, AARP had a full and fair opportunity to litigate the issue it now seeks to relitigate in this docket: whether the windfall must be returned to ratepayers through a credit or refund, rather than through the net benefits of an efficiency fund with initial investments appropriately recovered in rates.³

Regardless, AARP tries to minimize the importance of the Board’s Final Order in Docket 7213 by questioning its rationale and its applicability here. AARP would substitute its own narrow, self-serving interpretation of the Board’s 2001 Orders for that of the Board. The Vermont Supreme Court has recognized that the Board’s interpretation of its own orders is to be afforded deference on review. *See In re Appeal of Investigation Into the Existing Rates of Central Vermont Public Service Corp. and Tariff Filing of Central Vermont Public Service Corp.*, 180 Vt. 563, 564-65 (2006). The Department paid deference to the Board’s Order in Docket 7213 when crafting the MOU requiring Petitioners to add \$25 million in value to CVPS

³ The MOU approved by the Board in Docket 7213 does not preclude this result. While the MOU contained an agreement between AARP and GMP that the MOU and Order approving the MOU “relates only to AARP and Petitioners and shall not be construed as having precedential impact or any other impact on proceeding involving other parties to this proceeding or any other entities,” this provision relates only to the low income pilot program at issue in the agreement, and has no impact on the Board’s Orders denying summary judgment or its separate rejection of IBM’s arguments in its Final Order, Pet-Cross-10; Docket 7213 Final Order at 37.

customers – in addition to the \$144 merger savings guarantee to all ratepayers – to this acquisition and merger. AARP’s lack of deference and unwillingness to acknowledge the Board’s own interpretation of its prior windfall order undercuts the interpretation it attempts to spin here.

III. THE CEED FUND IS CONSISTENT WITH THE EFFICIENCY FUND APPROVED BY THE BOARD IN DOCKET 7213

As noted in prior briefing, thermal efficiency measures bring significant value to consumers; approval of such measures in the proposed CEED Fund is consistent with the Board’s approvals in the Gaz Metro/GMP efficiency fund. There are also direct electric system benefits to such investments. In addition to the evidence cited by the Petitioners in their Reply, the Department notes that there is record evidence which supports the fact that thermal efficiency measures provide electric system benefits. *See* AARP Cross-32, cited by Petitioners; AARP Cross-27 at 2-3, Response 1.A, Department’s Response to AARP’s Second Information Request (containing a list of reports and studies that demonstrate the electric system benefits of thermal efficiency measures).

Also, as noted in the Surrebuttal Testimony of Sen. Vince Illuzzi, “[w]eatherization assistance providers provide electrical as well as thermal benefits, and expanding investments in both services results in increased quality of life as well as decreased demand for state assistance (on the part of citizens) and demand for electricity (on the part of utilities).” Illuzzi Surreb. at 4; Attachment C to Illuzzi Surreb., *Weatherization Assistance Program Technical Memorandum Background Data and Statistics*, Oak Ridge National Laboratory, March 2010, at 7 (baseload measures taken in conjunction with weatherization in low-income households could result in savings of \$104-\$174 per household).

IV. THE BOARD HAS JURISDICTION OVER THE CORPORATE GOVERNANCE OF UTILITIES

As noted by other parties, a Shareholder's Agreement has been filed with the Board, resolving any disputes the Department has with VPPSA over corporate governance issues. However, notwithstanding that agreement, the Department is compelled to respond to a statement in VPPSA's Brief that VELCO corporate governance issues are outside of the Board's jurisdiction.

Under Title 30, the Board has jurisdiction over a number of corporate governance issues. *See, e.g.*, 30 V.S.A. §§ 104 (Board approval required for amendment to articles of incorporation); 105 (issuance of stock for property other than cash); 106 (ownership of stock in other corporations); 107 (acquisition of another corporation); 108 (issuance of bonds or other securities) & 209 (Board has jurisdiction over "all matters provided for in the charter or articles of any corporation owning or operating any plant, line or property subject to supervision under this chapter"). These provisions clearly provide the Board jurisdiction over a number of corporate governance issues relative to utilities. Moreover, the Board has jurisdiction to approve this acquisition and merger under conditions that ensure it will serve the public good, and therefore may issue an enforceable order conditioning approval upon adherence to restrictions related to Petitioners' actions now and in the future designed to effectuate the Board's findings regarding the public good.

CONCLUSION

As the Public Service Board and anyone who stays abreast of current events must be aware, this docket has generated a fair amount of public debate and contention in various forums. In another contentious docket that garnered significant public attention over a decade ago, the Board took pains to be very clear about the effect such public debate has on its decision-making. It said:

As a starting point, it is our duty to make it clear to all parties and to the public that our decisions regarding utility rates will not be directed by political pressure or public relations campaigns. This proceeding has involved the parties and the Board in the examination of a complex factual record. . . . Our decisions in this proceeding have been, and will be, decided upon the basis of the evidence in that record, regulatory precedent, and the law of Vermont. We will not decide this matter, or any rate case, on debates outside of the hearing room, or on assertions of the parties not grounded in the law or the evidence in the record.

Tariff Filing of Green Mountain Power Corp., Docket 5983, Order Re: Motion to Reconsider entered June 8, 1998, at 3. The Department believes that the approach the PSB brought to its task in Docket 5983 was and remains appropriate and most conducive to the public's interests.

For the reasons set forth above and in its initial brief, the Department recommends approval of the proposed transaction subject to the terms of the MOU entered between the Department and the Petitioners dated March 26, 2012.

Dated at Montpelier, Vermont, this 4th day of May, 2012.

VERMONT DEPARTMENT OF PUBLIC SERVICE

By: _____
John Beling, Director for Public Advocacy

By: _____
Geoffrey Commons, Special Counsel

cc: Service list